

The Impact of Discovery Limitations on Cost, Satisfaction, and Pace in Court-Annexed Arbitration*

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I. INTRODUCTION

During the past few years, virtually all state and federal jurisdictions have considered various alternative dispute resolution methods to treat major problems with their court systems.¹ Concern over the delay and high costs in the courts has led to the development of many procedural rule changes² and

* Research for this article was partially funded by The Program on Conflict Resolution, The University of Hawaii at Manoa. The data utilized was collected as part of an evaluation of Hawaii's Court-Annexed Arbitration Program which was funded by The Judiciary of the State of Hawaii. The authors would like to thank the following people for their assistance on this project: the project staff of the Study of Arbitration and Litigation, Claudia Karniyama, Mark Barnard, Thomas Webb, and Ratana Ariyavisitakul; our colleague and co-researcher, Professor David Chandler; Peter Adler, Director of the Hawaii Judiciary's Program on Alternative Dispute Resolution; Arbitration Administrator Ed Aoki and Susan Izumi; and Arbitration Judge Ronald T.Y. Moon.

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¹ See generally THE CENTER FOR PUBLIC RESOURCES LEGAL PROGRAM, ADR AND THE COURTS (1987) [hereinafter ADR]. In 1985, under the direction of Hawaii's Chief Justice Herman T.F. Lum, the Hawaii Judiciary, with partial support monies from the National Institute for Dispute Resolution, established a Program on Alternative Dispute Resolution. Peter S. Adler, formerly executive director of the Neighborhood Justice Center of Honolulu, was appointed as the Program's director. The Program has three general objectives: (1) to gather and disseminate up-to-date information on alternative dispute resolution methods; (2) to explore, test and evaluate new uses for mediation and arbitration; and (3) to help institutionalize these uses both in the courts and in the community-at-large. THE JUDICIARY, STATE OF HAWAII, 1984-1985 ANNUAL REPORT (1985).

² In 1983 the Federal Rules of Civil Procedure were amended to explicitly allow the judge to facilitate settlement discussions at the pretrial conference. FED. R. CIV. P. 16(A)(5). For an exam-

innovative programs.³

Court-annexed arbitration is one of the most popular innovations.⁴ Although the arbitration programs vary considerably in their form, they typically provide for mandatory, yet non-binding arbitration on cases that seek only money damages.⁵ The right to jury trial is preserved because either party may appeal the arbitration award to a trial de novo, but in some programs, sanctions may be imposed if the trial verdict does not improve on the arbitration award.

Court-annexed arbitration programs generally have been designed to ease court congestion and reduce delay.⁶ These programs, however, also offer the possibility of cost savings in the private litigation costs of plaintiffs and defendants, and in the public costs of operating the courts.

Whether court-annexed arbitration indeed does reduce delay and cost must be the subject of careful evaluation. The potential for improvements appears promising, but actual results will depend upon the arbitration procedures and the behavior of lawyers. For example, arbitration could save time and increase the pace of case processing either because the lawyers negotiate a settlement prior to the arbitration or because the arbitration hearing occurs earlier in the life of a case than a trial would occur. Time savings will not be realized, however, if parties do not reach an early settlement because they prefer to wait for an arbitration award rather than negotiate an earlier settlement or if a significant number of awards are appealed to a trial de novo after the arbitration hearing.

Because arbitration programs can reduce the amount of time that judges must spend on pretrial hearings, and the trial itself, the courts may save a considerable amount of judge and staff time, thereby reducing public costs.⁷ The impact on private litigation costs of the parties, however, is less clear. Pri-

ple of a state rule specifically concerning settlement conferences, see HAW. CIR. CT. R. 12.1.

³ See Planet, *Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project*, 37 RUTGERS L. REV. 279 (1985); Lambros, *The Summary Jury Trial - An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986); Levine, *Early Neutral Evaluation: A Follow-Up Report*, 70 JUDICATURE 236 (1987).

⁴ See P. EBENER & D. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (Rand Institute for Civil Justice 1985); NATIONAL CENTER OF STATE COURTS AND THE CONFERENCE OF STATE COURT ADMINISTRATORS, 1987 SURVEY OF STATE COURT ADMINISTRATORS (July 17, 1987) [hereinafter NATIONAL CENTER].

⁵ Levin, *Court-Annexed Arbitration*, 16 J. LAW REFORM 537, 537 (1983).

⁶ E. ROLPH, INTRODUCING COURT-ANNEXED ARBITRATION: A POLICYMAKER'S GUIDE 6 (Rand Institute for Civil Justice 1984). This volume also presents an excellent overview of the considerations involved in designing an arbitration program. See also Hensler, *Court-Annexed Arbitration*, in ADR, *supra* note 1, at 34-37.

⁷ For a discussion on calculating public cost savings, see E. ROLPH, *supra* note 6, at 33. For a discussion about the public financing of private litigation, see Alschuler, *Mediation with A Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier System in Civil Cases*, 99 HARV. L. REV. 1808, 1811-17 (1986).

vate cost savings would appear to correlate with the length of time a case remains open and to be inextricably linked to the amount of pretrial discovery.⁸ Recent research, however, indicates that case processing time is not correlated with costs.⁹ Therefore, if arbitration does not also reduce discovery and the amount of lawyer time, litigants are unlikely to save much in costs.¹⁰ In fact, costs will increase for those cases that are appealed after the arbitration award, since such cases will then incur the normal costs of litigation. However, the increased costs for the few cases that actually go to trial might be more than offset by the reduction in costs for cases that terminate in arbitration. Because the discovery question is so difficult, most programs do not attempt to limit discovery,¹¹ but at most restrict the time for,¹² but not the activity of, discovery.¹³

Since February 15, 1986, Hawaii has been experimenting with a court-annexed arbitration program for some types of civil cases. Hawaii's Court-Annexed Arbitration Program (CAAP) is limited to tort cases,¹⁴ but has several unique features that should be of interest to people across the country who are concerned with court management and alternative dispute resolution.

A. *Reasons for National Interest in the Hawaii Program*

The reasons for national interest in the Hawaii CAAP are found both in the central characteristics of the program and in the priority of program goals. The

⁸ See Hensler, *supra* note 6, at 39.

⁹ Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 104 (1983) [hereinafter *Costs of Litigation*].

¹⁰ See *id.*

¹¹ Alschuler, *supra* note 7, at 1845.

Only three states, Pennsylvania, Arizona, and Hawaii, appear to have arbitration programs that limit discovery. The Pennsylvania program is for small cases. In Pittsburgh, no discovery is allowed in cases valued at less than \$3,000. Developments, *Compulsory Automobile Arbitration: New Jersey's Road to Reducing Court Congestion, Delay, and Costs*, 37 RUTGERS L. REV. 401, 415 (1985). See ARIZ. UNIF. ARB. R. 3 ("The arbitrator . . . shall limit discovery whenever appropriate to insure that the purpose of compulsory arbitration is complied with.")

In the Hawaii program, discovery reduction is the key feature of the arbitration program. "Once a case is submitted or ordered to the program, the extent to which discovery is allowed, if at all, is at the sole discretion of the arbitrator." HAW. ARB. R. 14.

¹² Snow & Abramson, *Alternative to Litigation: Court-Annexed Arbitration*, 20 CAL. W.L. REV. 43, 58 (1983).

¹³ Some states are beginning to restrict discovery in regular litigation. Planet, *supra* note 3, at 279.

¹⁴ In Hawaii, tort cases account for approximately twenty-five percent of all Circuit Court cases, which are courts of general jurisdiction. For fiscal year 1986-87, of 5987 civil filings, 1,785, or 29.8 percent were personal injury cases. THE JUDICIARY, STATE OF HAWAII, 1986-1987 ANNUAL REPORT, STATISTICAL SUPPLEMENT, table 7 (1987).

program has the highest dollar ceiling (\$150,000) of any mandatory state arbitration program in the country and is the only state-wide program, it urges the arbitrator to limit discovery as a way of reducing litigant costs, it intervenes earlier in the case than other programs, and it uses volunteer arbitrators. Other important features include a "gatekeeping" procedure that presumes all cases are eligible for arbitration, a procedure that allows attorneys to seek exemption from the program when they think their case exceeds the \$150,000 ceiling, a required pre-hearing conference thirty days after an arbitrator has been assigned, and an option for litigants to select and pay for their own arbitrator.

The Hawaii CAAP differs from similar programs in other states because its primary purpose is to decrease litigant costs by reducing discovery activity. The program accomplishes this goal by prohibiting any discovery unless the arbitrator first authorizes the discovery. Most other arbitration programs would list their goals in the following order: (1) reduction of delay, (2) decrease in cost to litigants and (3) maintenance or improvement of litigant satisfaction. The Hawaii CAAP, however, has significantly reordered these priorities. The CAAP has made the decrease in costs to litigants the highest priority and therefore expects arbitrators to limit discovery in order to achieve the cost reduction goal.

This article first reviews court-annexed arbitration programs across the country. It then discusses pretrial delay and the high cost of litigation, which are the two most worrisome problems in the United States' judicial system. The article's discussion of delay and cost emphasizes how pretrial discovery and lawyers' fees contribute to these problems. The article then describes the Hawaii CAAP in detail with emphasis on the method used to limit pretrial discovery to reduce litigant costs.

The article then presents and interprets data taken from court records and lawyer surveys. Further evaluation shows that the Hawaii CAAP reduces litigation costs, that it may affect the incomes of lawyers, that it changes the level of lawyer satisfaction, and that defense lawyers see fewer benefits in the program than do plaintiff's lawyers.

II. COURT-ANNEXED ARBITRATION ACROSS THE NATION

Because of the rapid spread of arbitration programs nationally, it is difficult to say exactly how many jurisdictions currently use court-annexed arbitration programs. It is clear, however, that these programs have become very popular. Programs are currently operating in at least twenty-two states,¹⁵ the District of

¹⁵ CONFERENCE OF STATE COURT ADMINISTRATORS ALTERNATIVE DISPUTE RESOLUTION SURVEY: SURVEY OVERVIEW 6 (July 17, 1987); 1 *Alternative Dispute Resolution Rep.* (BNA) No. 16, at 313 (Nov. 26, 1987) [hereinafter SURVEY OVERVIEW].

Columbia, and at least eleven United States Federal District Courts.¹⁶ In three other states, arbitration programs are authorized but not yet operational.¹⁷

It is also difficult to give precise national statistics about arbitration program characteristics because the programs are often described as experimental and frequently undergo significant changes.¹⁸ In addition, jurisdictional thresholds may change¹⁹ or the programs may operate only in certain counties of the states that have adopted court-annexed arbitration.²⁰ Typically, the programs are limited to certain types of civil cases where the plaintiff seeks only money damages.²¹ Personal injury, contract, and debt cases are the typical cases that are arbitrated in these programs.²² Most of the programs are mandatory;²³ any case within the jurisdictional limit must go into arbitration. All programs, however, are non-binding.²⁴ Either party who is dissatisfied with the arbitration award can appeal and go on to a trial de novo. Many programs apply costs or sanctions to the appeal in an attempt to reduce the number of appeals.

¹⁶ As of January 1985 11 federal district courts had authorized court-annexed arbitration and at least 17 federal districts had applied for funds to operate new programs to start in 1985. P. EBENER & D. BETANCOURT, *supra* note 4, at 2, 6. The federal districts are the Eastern District of Pennsylvania, the Northern District of California, Connecticut, the Middle District of Florida, the Western District of Michigan, the District of New Jersey, the Southern District of New York, the Middle District of North Carolina, the Western District of Oklahoma, the Western District of Texas, and the Western District of Missouri. Lind & Foster, *Alternative Dispute Resolution in the Federal Courts: Public and Private Options*, 33 FED. BAR NEWS & J. 127 (1986).

¹⁷ Alaska, Illinois, and New Mexico have authorized arbitration. NATIONAL CENTER, *supra* note 4.

¹⁸ For example, Hawaii's arbitration program was described as a two-year experiment when it first began under the authorization of a state supreme court rule in February, 1986. Less than six months later, the state legislature created a new three-year experimental program. Letter from Janice Wolf, Administrative Director of the Courts, and Peter S. Adler, Director, Program on ADR, to the President and Members of the Senate, and the Speaker and Members of the House of Representatives of the Thirteenth State Legislature of the State of Hawaii (Dec. 30, 1986) (available in the office of The Study of Arbitration and Litigation, University of Hawaii at Manoa).

¹⁹ The state legislature increased the jurisdictional ceiling of Hawaii's arbitration program from \$50,000 to \$150,000 when the program was less than six months old. HAW. REV. STAT. § 601-20 (Supp. 1986).

²⁰ Usually the programs operate in major metropolitan districts. P. EBENER & D. BETANCOURT, *supra* note 4, at 5-6. To our knowledge, Hawaii is the only state in which the arbitration program operates in every county.

²¹ *Id.* at 9-10.

²² *Id.* at 7.

²³ Hawaii's initial Phase I program was voluntary. Lawyers had to request that their cases be placed into the arbitration program. HAW. ARB. R. 8 (repealed 1987).

²⁴ P. EBENER & D. BETANCOURT, *supra* note 4, at 4.

A. Case Size

Court-annexed arbitration programs in state courts are generally limited to "smaller" cases, although federal courts usually have high jurisdictional limits, usually \$50,000 to \$150,000. The maximum dollar limit for cases in the state programs typically ranges from \$15,000 to \$50,000,²⁵ although state programs range from a \$2000 ceiling to no limit at all. Hawaii has the second highest jurisdictional limit for a mandatory program in the nation and has the highest jurisdictional limit among those states that provide full arbitration hearings and take testimony from witnesses. Although the Michigan Mediation Program, which has no dollar limit, takes higher valued cases than CAAP, the Michigan program is really a case evaluation program.²⁶ The Michigan program does not hear testimony from witnesses, but hears only brief, summary presentations from lawyers. Therefore, Hawaii has the only state program that conducts arbitration hearings where parties can make personal presentations to a fact finder in cases valued at over \$50,000.

B. Compensation

Almost every jurisdiction compensates their arbitrators.²⁷ Most are either paid by the day²⁸ or by the case.²⁹ The unit of compensation however may not be a clear guide to the program's cost. In some programs arbitrators may work on a case for many days; while in other programs, the arbitrator can hear several cases in one day.³⁰

C. Delay and Costs, Discovery and Fees

Despite the fact that Rule 1 of the Federal Rules of Civil Procedure concludes with, "[these rules of civil procedure] shall be construed to secure the just, speedy, and inexpensive determination of every action,"³¹ virtually no one would seriously assert that the civil justice system in the United States is either

²⁵ P. EBENER & D. BETANCOURT, *supra* note 4.

²⁶ Stuart, Smith & Planet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307 (1983) [hereinafter *Settling Cases in Detroit*].

²⁷ It appears that only Hawaii and New Hampshire do not compensate their arbitrators. P. EBENER & D. BETANCOURT, *supra* note 4, at 9-10.

²⁸ Daily compensation ranges from \$50 to \$250 per day. *E.g.*, ARIZ. UNIF. ARB. R. 6.

²⁹ Compensation by the case ranges from \$35 to \$250 per case. P. EBENER & D. BETANCOURT, *supra* note 4, at 9-10. *E.g.*, CUYAHOGA COUNTY CT. C.P.R. 29(V).

³⁰ Some programs pay by the day or by the case, whatever is greater. CAL. CIV. P. CODE § 1141.18(b) (West Supp. 1985).

³¹ FED. R. CIV. P. 1.

speedy or inexpensive.³² Delay and high costs,³³ often resulting from congested dockets and excessive discovery, are considered the major problems of the American litigation system.³⁴

The statistics about delay seem significant; the criticism³⁵ appears sound.³⁶ The number of lawsuits filed each year has increased dramatically,³⁷ but the number of judgeships has not risen at a rate in any way comparable to the increase in filings.³⁸ Although increased filings are attributable to population growth, other factors are also responsible. For example, state and federal legislatures have created new claims.³⁹ Moreover, court case loads have increased considerably faster than the population.⁴⁰ Furthermore, Americans may be becom-

³² For a critique of the problems with the civil justice system, see J. MARKS, E. JOHNSON & P. SZANTON, *DISPUTE RESOLUTION IN AMERICA* 9-10, (National Institute for Dispute Resolution 1984); and Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395, 396 (1987).

³³ Delay and high costs are usually discussed together. "Excessive cost and delay in the disposition of civil cases devalue judgments, cause the memories of witnesses and parties to fade, cause litigants to accept less than full value for their claims, prolong and exacerbate differences between people or entities, and make pursuing legal remedies prohibitively expensive for many people." ABA'S LAWYERS CONFERENCE TASK FORCE ON REDUCTION OF LITIGATION COST AND DELAY, *DEFEATING DELAY* xiii (1986). See also ABA ACTION COMM'N TO REDUCE COURT COSTS AND DELAY, *ATTACKING LITIGATION COSTS AND DELAY: FINAL REPORT* (1984). Planet, *supra* note 3 ("Of the issues facing courts today, perhaps none is more urgent or visible than that of long delays and high costs to litigants associated with the pace of civil litigation.").

³⁴ The problems are not limited to the United States. See Falt, *Congestion and Delay in Asia's Courts*, 4 UCLA PAC. BASIN L.J. 90 (1985).

³⁵ J. ADLER, W. FELSTINER, D. HENSLER & M. PETERSON, *THE PACE OF LITIGATION* iii (Rand Institute for Civil Justice 1982) [hereinafter *PACE OF LITIGATION*] ("Of all the criticisms of the civil justice system, the charge of unjustifiable delay is probably the most frequently levelled and the most deeply felt.").

³⁶ Although there are some court statistics about court backlogs and many anecdotal stories, there simply is not as much empirical evidence on delay. *Id.* at vi.

³⁷ According to the former Chief Justice of the United States Supreme Court, "[t]he caseloads in both federal and state courts experienced a fantastic growth during the past sixteen years." Burger, *Introduction, Symposium: Reducing The Costs of Civil Litigation*, 37 RUTGERS L. REV. 217, 217 (1985).

³⁸ Former United States Supreme Court Chief Justice Warren E. Burger said "In the federal system alone, for example, the number of new filings in District Courts have nearly tripled from 112,606 when I took office in 1969 to 307,582 in 1985; the number of judges has increased only about 50%. In short, 300% more cases are to be handled by 50% more judges." ABA LAWYERS CONFERENCE TASK FORCE ON REDUCTION OF LITIGATION COST AND DELAY, *DEFEATING DELAY* vii (1986).

³⁹ S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 4 (1985); Yamamoto, *supra* note 32, at 400-01.

⁴⁰ In California the number of civil cases increased by 75% between 1969 and 1979, D. HENSLER, A. LIPSON & E. ROLPH, *JUDICIAL ARBITRATION IN CALIFORNIA*, 4-7 (Rand Institute for Civil Justice 1981). Between 1977 and 1981, the number of civil lawsuits in state courts grew

ing even more litigious.⁴¹ For whatever the reason, "you'll be hearing from my lawyer" remains the battle cry.⁴²

Despite the application of managerial judging techniques for the purpose of controlling the growing case dockets,⁴³ the assigned trial date may be several years after the date a case is filed in a major metropolitan area.⁴⁴ Despite some contrary evidence,⁴⁵ it is generally assumed that delay is harmful to litigants' cases and results in higher costs of litigation.⁴⁶ It is less clear however when, why, and where delay occurs.⁴⁷ Delay in the courts results, it is claimed, from congested court dockets that do not allow for trial dates until sometimes years after the filing of a complaint. Yet, a closer look shows that trial dates are not the true problem. The real problem is simply that cases are not resolved quickly enough because most cases never reach trial.⁴⁸ In theory, trial dates should not be significant. The trial date focus is important only because many cases do not get resolved until shortly before trial.⁴⁹

four times faster than the population of the United States, *TIME*, Mar. 24, 1986, at 20. However, while total filings have increased, not all types of litigation have increased at these dramatic rates. For example, between 1978 and 1984 the number of new tort cases increased 9% in 17 states, but the population in those states only rose 8%. *The Manufactured Crisis*, *MED. ECON.*, Nov. 10, 1986, at 69 (cited in D. HENSLE, M. VAIANA, J. KAKALIK & M. PETERSON, *TRENDS IN TORT LITIGATION 2* (Rand Institute for Civil Justice 1987)).

⁴¹ See, e.g., Barton, *Behind the Legal Explosion*, 27 *STAN. L. REV.* 567 (1975); Manning, *Hyperlexis: Our National Disease*, 71 *NW. U.L. REV.* 767 (1977). For a contrary view suggesting that hyperlexis is a myth, see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983). For the best explanation of these apparently contrary findings, see Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 *OHIO ST. L.J.* 479, 492 (1987).

⁴² "Sue the Bastards" is a bumper sticker that is popular with more than just lawyers.

⁴³ A survey of state court administrators found that 48 states have recently adopted or were considering changes in civil procedure intended to reduce pretrial delay, P. EBENER, *COURT EFFORTS TO REDUCE PRETRIAL DELAY* (Rand Institute for Civil Justice 1981).

⁴⁴ It takes forty months to get to trial in Los Angeles, and three years in other parts of California. It takes three years to get to trial in the large urban areas of Pennsylvania. Snow & Abramson, *supra* note 12, at 44.

⁴⁵ *Costs of Litigation*, *supra* note 9, at 104.

⁴⁶ A few observers, however, argue the delay may be a benefit. *PACE OF LITIGATION*, *supra* note 35, at x.

⁴⁷ *Id.* at vi.

⁴⁸ Of course not all cases that are not tried are settled. One of the few studies to examine the terminations of the vast number of cases that are not tried found that only 63 percent settled. Thirty percent of the cases were terminated by means other than trial or settlement. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 *JUDICATURE* 161, 163 (1986).

⁴⁹ In a study of case dispositions, Professor Gerald Williams reported, "In Phoenix, for example, we found that over 70% of all cases were settled within 30 days of the trial date." G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 78, n.23 (1983).

Since most cases are resolved in a negotiated agreement without a trial, it appears that lawyers and clients could actively reduce the delay by settling their cases earlier. It is unclear why they do not settle earlier. Many cases go through extensive pretrial discovery, which is expensive for the clients and income producing for the hourly-fee lawyers. Determining damages is another probable source of delay for both sides. Plaintiff lawyers may be waiting for their clients' injuries to stabilize,⁶⁰ while the defense may be expecting to see some rehabilitation that will reduce the damages. Some commentators contend that defendants want to hold on to their money and invest it as long as possible.⁶¹ Perhaps the adversary system creates so much animosity between the parties that neither side is willing to extend a hand in compromise even if it might lead to a settlement. Finally, lawyers might not give serious attention to a case until it gets close to the "doomsday" event of trial.⁶²

Despite the variety of attempts made to control delay, such as different types of case calendaring, docket control methods, and settlement conferences, pretrial delay remains as a serious and potentially crippling problem for court administrators and others concerned with optimizing justice in United States courts. Although delay has been treated, but certainly not cured, costs have been generally untouched by procedural reforms.

D. Cost

Although discovery is an essential⁶³ cornerstone of litigation, the costs of pretrial discovery are transforming our legal system into a system that is so costly that someday only corporations⁶⁴ and wealthy individuals will be able to afford to use it.⁶⁵ In cases where lawyers work for an hourly fee, the high cost of

⁶⁰ Comment by speaker, Masters of the Game Seminar, Hawaii Institute for Continuing Legal Education (Apr. 30, 1988).

⁶¹ PACE OF LITIGATION, *supra* note 35, at vi; Pepe, *Professional Responsibility in Pretrial Discovery—A Tale of Two Cities*, 64 MICH. BAR J. 300 (1985); Alschuler, *supra* note 7, at 1845 ("[P]reserving the status quo favors the defendant in almost every lawsuit.").

⁶² E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 79 (Federal Judicial Center 1983).

⁶³ As noted in *Hickman v. Taylor*, 329 U.S. 495 (1947), "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Id.* at 507.

⁶⁴ "The former chairman of one of America's largest corporations recently quipped that 'My lawyers have an unlimited budget, and every year they exceed it.'" J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM iii (Rand Institute for Civil Justice 1982).

⁶⁵ A popular cartoon that sums up the problem shows a lawyer asking a prospective client, "Now, just how much justice can you afford?"

For a detailed examination of the problem see the articles in "Symposium: Reducing the Costs of Civil Litigation", 37 RUTGERS L. REV. 217 (1985), especially Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219 (1985); Peckham, *A Judicial Response to the Costs of*

bringing suits may deter ordinary people from pressing their legitimate legal claims.⁵⁶

A growing criticism argues that civil cases are over-discovered.⁵⁷ A vast amount of material has been written about discovery abuse and the assumed, parallel rise in the litigation costs because of this discovery.⁵⁸ In fact, the word "abuse" appears in the titles of many publications about discovery.⁵⁹ Criticism

Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution, 37 RUTGERS L. REV. 253 (1985); Planet, *supra* note 3; Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective* 37 RUTGERS L. REV. 339 (1985).

⁵⁶ The cost of discovery probably would not deter either side in litigating a tort lawsuit. Because plaintiff lawyers take personal injury cases on a contingent fee, presumably injured plaintiffs will always be able to find a lawyer. Even poor plaintiffs can file lawsuits because their discovery costs are advanced by plaintiff lawyers, who deduct the discovery costs from the plaintiff's recovery. These plaintiffs, however, might still not find a lawyer to represent them if the lawyer thinks the case is uneconomical (damages are low, or liability is very questionable) or the lawyer might not be able to advance large sums of money to conduct discovery. Defendants, of course, will defend virtually all tort lawsuits because insurance companies are involved in most of these suits. Insurance companies have the financial resources to litigate in all cases where it is appropriate.

⁵⁷ As observed by one commentator, "[s]ome over discovery results from compulsive, perfectionist attorneys worried about professional criticism for lack of thoroughness, and fearing failure at trial or settlement without near-perfect knowledge. The more common problem comes from fixed law firm routines, aided by form books and word processors." Pepe, *supra* note 51, at 302.

⁵⁸ Depositions are the costliest of discovery devices. Schmidt, *The Efficient Use of Discovery*, FOR THE DEFENSE, Jun. 1984, at 25, 27.

⁵⁹ C. ELLINGTON, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE 17 (U.S. Dep't of Justice 1979); ABA SECTION OF LITIGATION, SPECIAL COMM'N FOR THE STUDY OF DISCOVERY ABUSE, FIRST REPORT (1977), reprinted in 92 F.R.D. 149 (1982); ABA SECTION OF LITIGATION, SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (1980), reprinted in 92 F.R.D. 137 (1980); Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267, 274-75 (1978); Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 A.B.F. RES. J. 217, 230-35; Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 A.B.F. RES. J. 789; Comment, *Preventing Discovery Abuses in the Federal Courts*, 30 CATH. U.L. REV. 273, 284-305 (1981); *District of Columbia Survey: Hinkle v. Sam Blanken & Co.: Dismissal for Discovery Abuse — Toward a New Standard in the District of Columbia*, 36 CATH. U.L. REV. 761 (1987); Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982); Note, *Rule 37 Sanctions: Deterrents to Discovery Abuses*, 46 MONT. L. REV. 95 (1985); Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIGATION 1 (1982); Lundquist & Flegal, *Discovery Abuse — Some New Views About an Old Problem*, 2 REV. LITIGATION 1 (1981); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978); Flegal & Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, 1981 B.Y.U. L. REV. 597 (1981); Pollack, *Discovery — Its Abuse and Correction*, 80 F.R.D. 219 (1978); Rosenberg, *Discovery Abuse*, 7 LITIGATION at 8, 9-10 (Spr. 1981); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579; Sherwood, *Curbing Discovery Abuse: Sanctions Under the Federal Rules of Civil Procedure and the California Code of Civil Procedure*, 21 SANTA CLARA L. REV. 567 (1981);

of discovery includes excessive use of discovery, sometimes in a "fishing expedition,"⁶⁰ the unjustified resistance of legitimate discovery,⁶¹ opportunities to delay the resolution of valid legal claims,⁶² and attempts to intimidate the other party with the cost of discovery. Although discovery procedures are, in theory, designed to improve the exchange of information between the parties, discovery is frequently put to a more adversarial use by delaying and making the pursuit of a legal claim much more costly.⁶³ At least for the hourly-fee lawyers, discovery activity generally means an opportunity to bill more legal fees to the client.⁶⁴

Although discovery apparently is the prime villain in the criticisms about delay and costs, it is only a part of the total cost of litigation. Lawyers' fees are actually the larger,⁶⁵ although lesser discussed, aspect of costs.⁶⁶ The combined fees and expenses of plaintiff and defense lawyers in tort litigation range from 45 to 63 percent of the total amount expended in this litigation, including the amount received by the injured plaintiffs.⁶⁷ After deducting lawyers' fees, dis-

Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680 (1983); Note, *Rule 37 Sanctions: Deterrents to Discovery Abuses*, 46 MONT. L. REV. 95 (1985); Levine, *Abuse of Discovery: or Hard Work Makes Good Law*, 67 A.B.A. J. 565 (May 1981); Batista, *New Discipline in Old Game—Sanctions for Discovery Abuse*, N.Y.L.J., Aug. 16, 1982, at 1, col. 2; Dombroff, *Objective Procedures Could Curb Discovery Abuse*, Legal Times, Sept. 6, 1982, at 15, col. 1; Huffman, *Protracted Litigation, Abuses of Discovery Targeted by Judge*, Legal Times, July 26, 1982, at 1, col. 1, at 32; Tell, *Legal Fee Axed for Litton Case Discovery Abuse*, NAT'L L.J., Oct. 12, 1981, at 2, col. 4.

⁶⁰ A "fishing expedition . . . undertaken in the hope that some cause of action might be uncovered." *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1383 (D.C. Cir. 1984).

⁶¹ Thames, *Discovery Strategy*, FOR THE DEFENSE, Jan. 1986, at 12-13. For a list of lawyering skills of evasion and incomplete responses, see Pepe, *supra* note 51, at 301.

⁶² R. HAYDOCK, D. HERR & J. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* 121 (1985) ("Discovery for other lawyers seems to be the best way to avoid or delay going to trial, and that attitude, too, accounts for its share of the abuse of discovery procedures.").

⁶³ See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979).

⁶⁴ One lawyer said, "Discovery is good for our business but has nothing to do with justice." Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 A.B.F. RES. J. 217, 250 n.53; Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 A.B.F. RES. J. 787.

⁶⁵ ABA ACTION COMM. TO REDUCE COURT COSTS AND DELAY, *ATTACKING LITIGATION COSTS AND DELAY* 60 (1984) [hereinafter *COSTS AND DELAY*].

⁶⁶ Lawyers' fees are part of litigation "transactions costs," which are "the sum of plaintiffs' costs, defense costs, and public costs. They are the 'overhead' costs of the system in the sense that the services purchased are not desired for themselves." S. CARROLL & N. PACE, *ASSESSING THE EFFECTS OF TORT REFORMS* 22 (Rand Institute for Civil Justice 1987).

⁶⁷ In auto torts, the defense legal fees are 19 percent, plaintiff legal fees are 26 percent, and

covery costs, and other costs of litigation, plaintiffs receive only about 50 percent⁶⁸ of the money paid out in trial verdicts or money paid to settle claims in regular tort cases.⁶⁹

Lawyers' fees are partially related to discovery, although the precise relationship is dependant on how fees are calculated. Defense lawyers are almost always⁷⁰ paid on an hourly basis. In most tort litigation, the defense lawyers are paid by insurance companies. A large part of the hours defense lawyers bill for tort litigation are hours spent conducting discovery. It is obvious that reducing discovery will reduce the defense costs. Of course any program that reduces the amount of discovery will have a corresponding effect on the income of the hourly-fee defense lawyers, court reporters and paralegals.⁷¹

Plaintiffs' lawyers, on the other hand, are paid on a contingent fee basis. These lawyers receive no fee unless the plaintiff recovers. Typically, plaintiffs' lawyers take a 33½ to 40 percent contingent fee, although the rates vary depending on the jurisdiction, the type of case, and the personal reputation of the lawyer.⁷² Because plaintiffs' lawyers are not paid on an hourly basis, reducing discovery will not automatically reduce the lawyer's fee.⁷³ In fact, studies of fee

the net compensation to the plaintiff is 52 percent. In non-auto torts, the defense legal fees are 30 percent, plaintiff legal fees are 24 percent, and the net compensation to the plaintiff is 43 percent. In asbestos cases, the defense legal fees are 37 percent, plaintiff legal fees are 26 percent, and the net compensation to the plaintiff is only 37 percent. D. HENSLER, M. VAIANA, J. KAKALIK & M. PETERSON, *TRENDS IN TORT LITIGATION* 29 (Rand Institute for Civil Justice 1987).

⁶⁸ Plaintiffs in automobile accident cases net about 52 percent of the total expenditures. In non-auto torts they only receive about 37 percent of the transaction costs. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 OHIO ST. L.J. 479, 492 (1987).

⁶⁹ Costs are extremely high in asbestos cases. The average payout to plaintiffs in asbestos litigation is only thirty-seven cents of every dollar paid by the insurance companies. J. KAKALIK, *COSTS OF ASBESTOS LITIGATION* (Rand Institute for Civil Justice 1983).

⁷⁰ In arbitration cases some lawyers are being paid to handle the case on a flat fee basis through the arbitration hearing. If there is an appeal of the arbitration award, a new fee arrangement is instituted in anticipation of trial de novo.

⁷¹ Insurance companies are aware the discovery reductions which save expenses for the company will reduce defense fees. In Hawaii, these companies are trying to avoid problems with their defense lawyers by promising that every time that a defense lawyer settles a case in arbitration, another new case will be given to the defense lawyer to replace the one that has settled.

⁷² In Hawaii, the fee is generally 33½ percent in automobile accident tort cases, and 40 percent for all other torts. At the time of recovery, the lawyer receives the agreed upon percentage of the recovery. The costs of discovery are deducted from the plaintiff's share of the recovery, and the plaintiff's lawyer is reimbursed for the advance of the discovery costs. Finally, the plaintiff receives the net sum remaining. If there is a defense verdict at trial, the plaintiff still owes the plaintiff lawyer for the costs of discovery, but in actuality the plaintiffs seldom pay back those advanced discovery costs, and plaintiffs' lawyers seldom pursue their claim against the plaintiff for the advanced discovery costs. Interview with a plaintiff's lawyer (April 20, 1988).

⁷³ H. HENSLER, A. LIPSON & E. ROLPH, *JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR*

structures have shown that programs saving the time of a plaintiff's lawyer did not result in a fee reduction for the client.⁷⁴ It is therefore possible that a reform that reduces discovery will not reduce the income of plaintiffs' lawyers, but will actually allow these lawyers to make the same amount of money in less time.

The contingent fee system is a major subject of controversy,⁷⁵ especially in the age of "tort reform" and the concerns about medical malpractice litigation. Those in favor of the contingent fee say that it is "the poor man's key to the courthouse."⁷⁶ Opponents, however, retort "that greedy attorneys, hungry for fat contingency fees, generate suits that would not otherwise be brought."⁷⁷ In striking a balance between these two views, some jurisdictions have placed limits on the amount of fees that a plaintiff's lawyer can receive, at least in medical malpractice cases.⁷⁸

82 (Rand Institute for Civil Justice 1981). Developments, *Compulsory Automobile Arbitration: New Jersey's Road to Reducing Court Congestion, Delay, and Costs*, 37 RUTGERS L. REV. 401, 430-31 (1985).

⁷⁴ In contingent fee cases, with procedures that save attorney time, "lawyers are benefiting, but clients are not." COSTS AND DELAY, *supra* note 65, at 66. Chapper & Hanson, *Attorney Time Savings/Litigant Cost-Savings Hypothesis: Does Time Equal Money?*, 8 JUST. SYS. J. 258 (1983).

⁷⁵ In concluding, we emphasize again our firm conviction that to the maximum degree possible litigants themselves should be the beneficiaries of reductions in the cost of litigation. At the same time, we are acutely aware that overall costs to litigants are in the main a reflection of how attorney's fees are structured in the United States and the various methods of calculating such fees. Whether those fees are fair to counsel and client and whether they can or should be changed substantially in amount or method of calculation pose fundamental issues of fairness and political feasibility that our mission and our resources could not encompass. We feel strongly, however, that the organized bar, at both the national and state levels, has an inescapable and immediate duty to address this overriding issue of how attorneys' fees affect litigant cost and access to justice.

COSTS AND DELAY, *supra* note 65, at 67. See also, Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 530 (1978); Kriendler, *The Contingent Fee: Whose Interests are Actually Being Served?*, 14 FORUM 406 (1979).

⁷⁶ Comment, *Medical Malpractice in Florida: Prescription For Change*, 10 FLA. ST. U.L. REV. 593, 609 (1983) (citing the Florida Academy of Trial Lawyers, SELF-PRESERVATION OF A PRIVILEGED CLASS 11 (1982)).

⁷⁷ Comment, *Recent Medical Malpractice Legislation — A First Checkup*, 50 TUL. L. REV. 655, 670 (1976).

⁷⁸ COSTS AND DELAY, *supra* note 65. Klein, *Caps in the Hat: Legislative Lids on Runaway Verdicts*, FOR THE DEFENSE, Jul. 1986, at 19, 22.

Section 6146 of California's Medical Injury Compensation Reform Act of 1975 (MICRA) limits contingency fees in actions against a health care provider based upon alleged professional negligence to: (1) 40% of the first \$50,000 recovered; (2) 33½% of the next \$50,000; (3) 25% of the next \$100,000; and (4) 10% of any amount on which the plaintiff's recovery exceeds \$200,000.

See also DEL. CODE ANN., tit. 18, § 6865 (Supp. 1988) (medical malpractice); TENN. CODE ANN. § 29-26-120 (Supp. 1988) (medical malpractice).

See *Roa v. Lodi Medical Group*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77, *appeal*

III. HAWAII'S COURT-ANNEXED ARBITRATION PROGRAM

A. Program Goals

The intent of Hawaii's arbitration program "is to provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters."⁷⁹ It is generally agreed that the major goals of the program are: (1) to reduce litigant costs, (2) to increase the pace of disposing of tort cases, and (3) to improve or at least maintain the level of satisfaction for litigants and attorneys.⁸⁰ Although the arbitration program currently handles only tort cases,⁸¹ the arbitration rules provide that parties may agree to submit other types of civil cases to the program.⁸²

B. Program History

The Hawaii CAAP has operated in two different forms. When the program first began in 1986, it was designed under the Hawaii Supreme Court's rule-making power as a two-year experiment and was authorized in the Circuit Court Rules for the First Circuit.⁸³ Initially, the program was voluntary. Any party could request that a tort case at or below a "probable jury award of \$50,000" be placed into the arbitration program. This first \$50,000 program is now referred to as Phase I.

Less than six months after the start of what was to have been a two-year experiment, the Hawaii legislature changed the arbitration program. During a special legislative session, it passed Act 2 of 1986,⁸⁴ as part of "Tort Reform" legislation.⁸⁵ The most significant program change required by this new law was a major increase in the jurisdictional ceiling for arbitration cases. Beginning on May 1, 1987, the program was changed to require the arbitration of tort cases

dismissed, 474 U.S. 990 (1985) (upholding the limit on contingent fees paid to plaintiff's lawyer).

⁷⁹ HAW. ARB. R. 2(A).

⁸⁰ Letter from Janice Wolf, Administrative Director of the Courts and Peter S. Adler, Director, Program on ADR, to the President and Members of the Senate, and the Speaker and Member of the House of Representatives of the Thirteenth State Legislature of the State of Hawaii (Dec. 30, 1986) (available in the office of The Study of Arbitration and Litigation, University of Hawaii at Manoa).

⁸¹ HAW. ARB. R. 6(A).

⁸² Admission to the program also requires the consent of the Arbitration Judge. *Id.* R. 6(B). To date, no non-tort cases have been accepted into the program.

⁸³ HAW. CIR. CT. R. 34.

⁸⁴ HAW. ARB. R. 6(A).

⁸⁵ For a list of state tort reform laws passed in 1986, see S. CARROLL & N. PACE, *ASSESSING THE EFFECTS OF TORT REFORMS* 47-72 (Rand Institute for Civil Justice 1987).

with "a probable jury award value, not reduced by the issue of liability, exclusive of interest and costs, of \$150,000 or less."⁸⁶

C. *Discovery Limitations*

The design of the Hawaii program makes it clear that reducing litigant costs is the prime goal of the program, and limiting discovery is the central mechanism. Although most arbitration programs schedule arbitration hearings after formal discovery has been completed, Hawaii's program does not allow *any* discovery without the consent of the arbitrator. Arbitrators are given certain guidelines for reducing or eliminating discovery.⁸⁷ Informal, less costly methods of discovery are encouraged.

D. *Jurisdictional Amount*

The Hawaii Court-Annexed Arbitration Program has, at \$150,000, the highest jurisdictional amount of any mandatory, full arbitration program in a state court.⁸⁸ Even in the Phase I (\$50,000) program, Hawaii's jurisdictional amount was as high as any state full-arbitration program in the country.⁸⁹ In the Phase II (\$150,000) program, Hawaii's jurisdictional amount is three times higher than any other state arbitration program.⁹⁰ Only a few federal courts

⁸⁶ HAW. ARB. R. 6(A).

⁸⁷ The training materials for arbitrators suggest that the following considerations be given to any discovery request:

- a. Balance the benefit of discovery requested against the expense and necessity.
- b. Nature and complexity of the case.
- c. The amount in controversy.
- d. Possibility of unfair surprises which may result if discovery is restricted.

PACIFIC L. INST., HAWAII ARBITRATION SOURCEBOOK, 2-14 (1987).

⁸⁸ Michigan has a mandatory program which has no jurisdictional limit. This program, however, does not contemplate full arbitration hearings with testimony presented by witnesses. Each case is allocated approximately 30 minutes before a panel of three mediators (a plaintiff lawyer, and defense lawyer, and a neutral lawyer) who make an arbitration award. The award is more of a case evaluation based upon the short presentation by the opposing lawyers and answers to questions posed by the panel rather than an adjudicative result after hearing witnesses. Although it is called the Michigan "Mediation" Program, the panel of lawyers perform the service of arbitrators who propose a non-binding result and not the service of mediators who assist the parties to reach their own decision. Interview with Robert W. Schweikart, Mediation Tribunal Clerk, Mediation Tribunal Association for the Third Judicial Circuit Court of Michigan (Jan. 1987). See also *Settling Cases in Detroit*, *supra* note 26.

⁸⁹ *But see* the Michigan Mediation program where mediators decide many cases per day. Shuart, Smith & Planet, *supra* note 88.

⁹⁰ California, Colorado, and Minnesota all have jurisdictional limits of \$50,000. Keilitz, Gallas & Hanson, *State Adoption of Alternative Dispute Resolution*, ST. CT. J., Spr. 1988, at 4.

have jurisdictional amounts as high as Hawaii's.⁹¹

E. Compensation for Arbitrators

Most arbitration programs compensate the arbitrators or at least provide an honorarium.⁹² Hawaii, however, is asking its arbitrators to volunteer their time, providing essentially "pro bono" service.⁹³ Arbitrators have averaged 6 hours of work on cases that settled and 16 hours of work on cases in which an award was rendered.

F. Changes from Phase I to Phase II

When the state legislature mandated that the Hawaii arbitration program include cases valued up to \$150,000, the Judicial Arbitration Commission,⁹⁴ which designed and oversaw the rules, reviewed the arbitration procedures and revised some of these procedures in order to accommodate the new jurisdictional amount. The Commission took this opportunity to make several other program changes.

A significant change occurred in the gatekeeping function. In Phase I, all tort cases valued at \$50,000 or less were supposed to enter the program. These cases, however, entered the program only if the plaintiff requested or the defendant demanded arbitration. In essence, cases were invited into the program; it was a voluntary program. As might be expected, many cases did not enter the program for reasons of ignorance, caution, suspicion, or tactics.⁹⁵ In Phase II, the gatekeeping function was changed significantly. Now, all tort cases automatically enter the program when they are filed in Circuit Court and attorneys who do not think that their cases belong in the program must make a special request to be exempted from the program.

To better control the flow of cases through the CAAP, Phase II rules require arbitrators to schedule a pre-hearing conference within thirty days of the date a case is assigned.⁹⁶ In addition, the arbitration selection process was changed.

⁹¹ See P. EBENER & D. BETANCOURT, *supra* note 4 (The jurisdictional limit for the Middle District of North Carolina is \$150,000.); see also SURVEY OVERVIEW, *supra* note 15.

⁹² P. EBENER & D. BETANCOURT, *supra* note 4, at 8-10.

⁹³ There has been an on-going discussion whether CAAP should at least pay the arbitrators an honorarium. Any payment to arbitrators will, of course, increase the cost of the program.

⁹⁴ The Commission is a body of representatives of plaintiff and defense lawyers as well as one representative from the insurance industry. It has the responsibility to "develop, monitor, maintain, supervise and evaluate the program." HAW. ARB. R. 4(A).

⁹⁵ The noted rationales were gleaned from interviews with lawyers, available on file in the office of The Study of Arbitration and Litigation, University of Hawaii at Manoa.

⁹⁶ HAW. ARB. R. 15(D).

Under Phase I rules, one arbitrator was initially assigned to a case, and if either party objected to the arbitrator, a list of five potential arbitrators was proposed to the parties. Each party was allowed to strike two names. The arbitrator who remained after both parties struck two potential arbitrators, or one of the remaining arbitrators if only one party struck names, was appointed.⁹⁷ Under Phase II rules, five potential arbitrators are initially proposed.⁹⁸

During the summer of 1987, CAAP was expanded to all circuit courts in the state.⁹⁹ Expansion to the neighbor islands offers new challenges to the program, most notably, ensuring a sufficient supply of arbitrators on each of the neighbor islands.¹⁰⁰

G. Hawaii's Program Description

The Hawaii CAAP is a mandatory, non-binding arbitration procedure for tort cases with a probable jury award of less than \$150,000. For purposes of this program, all tort cases are presumed to be valued at \$150,000 or less.¹⁰¹ In other words, all tort cases are initially assigned to the arbitration program, and then attorneys are required to submit a request to have their case exempted from the program if they believe the value of the case exceeds \$150,000.¹⁰²

After the last defendant's answer is filed, a volunteer arbitrator¹⁰³ is assigned to the case. The arbitrator must schedule a pre-hearing conference within thirty days from the date the case is assigned,¹⁰⁴ and must determine what pretrial discovery the arbitrator will permit. Discovery is permitted only with the consent of the arbitrator.¹⁰⁵ The arbitrator can assist in settling the case if all par-

⁹⁷ HAW. ARB. R. 9 (repealed 1987).

⁹⁸ HAW. ARB. R. 9.

⁹⁹ *Id.* 27.

¹⁰⁰ Twenty-three percent of Hawaii's population lives on the neighbor islands, but only six percent of the state's lawyers live on the neighbor islands. HAW. BAR NEWS, July 1988, at 20. Observers agree that most potential arbitrators on the neighbor islands are plaintiff's attorneys. The neighbor island arbitrator pool has raised issues regarding the balance of the pool.

¹⁰¹ Under the Phase II program, all cases are presumed into the program. HAW. ARB. R. 8(A). Under the earlier Phase I program, either the plaintiff or the defendant could request arbitration for cases valued at \$50,000 or less. HAW. ARB. R. 8 (repealed 1987).

¹⁰² HAW. ARB. R. 8(A). The Arbitration Administrator automatically exempts wrongful death cases.

¹⁰³ Currently all arbitrators are lawyers. The attorneys "shall have substantial experience in civil litigation, and shall have been licensed to practice law in the State of Hawaii for a period of five (5) years, or can provide the Judicial Arbitration Commission with proof of equivalent qualifying experience." *Id.* 10(B).

¹⁰⁴ *Id.* 15(D).

¹⁰⁵ HAW. ARB. R. 14(A) ("Once a case is submitted to the Program, the extent to which discovery is allowed, if at all, is at the sole discretion of the arbitrator.").

ties consent in writing.¹⁰⁶ If the case proceeds to an arbitration hearing, the attorneys must file a pre-hearing statement¹⁰⁷ within thirty days prior to the date of the hearing.¹⁰⁸

At the arbitration hearing, the rules of evidence are relaxed¹⁰⁹ and no transcription or recording is permitted.¹¹⁰ Although findings of fact and conclusions of law are not required, arbitration awards must be in writing.¹¹¹ Awards are not limited to the jurisdictional amount of \$150,000.¹¹² Awards must be filed within seven days of the conclusion of the arbitration hearing or within thirty days after the receipt of the final authorized memoranda of counsel.¹¹³ The award becomes the final judgment if neither party files a written Notice of Appeal and Request for Trial De Novo within twenty days after the award is served upon the parties.¹¹⁴ If such Notice and Request is timely filed, the case is scheduled for trial de novo. The case is then treated as if arbitration did not occur and full discovery is permitted under the rules of civil procedure. No testimony made during the course of the arbitration hearing is admissible in the trial de novo.¹¹⁵

There are disincentives attached to the appeal process in the form of sanctions for failure to prevail in the trial de novo. When parties appeal, they must receive an award that is at least fifteen percent greater at the trial de novo than they received at the arbitration award.¹¹⁶ If the party fails, the party is subject to sanctions of attorney fees up to \$5000, costs of jurors, and other reasonable costs actually incurred since the appeal of the arbitration award.¹¹⁷

H. Program Evaluation—Research Project Design

Researchers from the University of Hawaii have been studying and evaluating the arbitration program through a project called The Study of Arbitration and Litigation (SAL).¹¹⁸ The evaluation is conducted in a randomized¹¹⁹ exper-

¹⁰⁶ *Id.* 11(A)(10).

¹⁰⁷ The arbitration rules dictate the contents of the pre-hearing statement, which includes material similar to what would be included in a pre-trial settlement conference with a judge. *Id.* 16.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* 11(A)(2).

¹¹⁰ *Id.* 17.

¹¹¹ *Id.* 19.

¹¹² *Id.* 19(B).

¹¹³ *Id.* 20(A).

¹¹⁴ *Id.* 21.

¹¹⁵ *Id.* 23(C).

¹¹⁶ *Id.* 25.

¹¹⁷ *Id.* 26.

¹¹⁸ The Study of Arbitration and Litigation (SAL) is located at Department of Sociology,

imental design with two groups of cases; one-half of the cases are assigned to the arbitration program and the remaining one-half of the cases are designated as a "comparison group" and are assigned to regular litigation.¹²⁰ Initially, all tort cases are presumed eligible for arbitration and are assigned to the arbitration program when they are filed in the clerk's office. Eligible cases are then assigned either to arbitration or to regular litigation by random numbers.

A comparison group of cases is necessary to measure the effects of arbitration against cases in regular litigation. A comparison group is also necessary to develop an adequate database on cases in regular litigation. Current court records are only partially useful in this regard because they are geared to tracking cases, but not to evaluating alternatives.

The focus of the evaluation is on: (1) cost, (2) pace, and (3) satisfaction, which are factors reflecting the goals of CAAP. "Cost" includes discovery costs, time spent on cases by plaintiffs' lawyers, and hourly fees of defense lawyers. "Pace" measures the time necessary to resolve a case once it enters the arbitration program. "Satisfaction" is measured by questions asking lawyers how satisfied they and their clients were with the program. The essence of the program evaluation is to determine whether disposing of a case in the arbitration program can decrease cost and increase pace, while maintaining satisfaction.

Aside from whether or not the case was in CAAP, several major factors are expected to influence cost, pace, and satisfaction. Maximum exposure, case complexity, experience of and confidence in the arbitrator, and whether the case progressed to an award or was settled, may be significant factors. On an even more basic level, lawyers may have different views of arbitration because arbitration impacts plaintiff and defense lawyers differently, especially in the area of lawyers' fees. Because the arbitration program seeks to reduce discovery, the effect of arbitration on contingent-fee plaintiffs' lawyers, who do not get paid for the time they expend on discovery may be different from the effect on the

Porteus Hall 237, University of Hawaii at Manoa, Honolulu, Hawaii, 96822. This project is currently funded by a three-year contract from the Hawaii Judiciary and in-kind contributions from the Program for Conflict Resolution, The Sociology Department, and the William S. Richardson School of Law, all of the University of Hawaii at Manoa.

¹¹⁹ The randomized experiment has been referred to as "the most powerful of research designs." Lind & Foster, *supra* note 16, at 128. For more about random samples, see D. Vinson & P. Anthony, *Social Science Research Methods for Litigation* 142-44 (1985).

¹²⁰ This proportion of regular litigation cases to arbitration cases has changed because of program needs. Formerly, one-third of the cases were randomly assigned to the comparison group. Originally one-third was decided upon as the random comparison sample by the Arbitration Commission, the Arbitration Administrator, and the evaluation team. It was later increased to one-half at the behest of CAAP to decrease the number of arbitrators needed. Some plaintiff lawyers whose cases fell randomly in the comparison sample have complained that they want their comparison case placed into the arbitration program. These comments suggest that the arbitration program is satisfactory to plaintiff's lawyers.

hourly-fee defense lawyers who derive the major portion of their fees from conducting discovery. Perhaps other factors that have not yet been isolated will also have a substantial effect.

Data collected for the evaluation are kept in the strictest confidence. Only aggregated information is released. Evaluation data is collected from: (1) court and arbitration records, (2) surveys sent to lawyers and arbitrators for cases both in arbitration and regular litigation, and (3) inquiries to insurance companies, discussions with judiciary employees, and interviews with lawyers.

The evaluation was begun by using a survey questionnaire for lawyers and arbitrators and the case record files maintained by the court and the arbitration program. During the late fall of 1986 and the early spring of 1987, telephone interviews were conducted with forty-six lawyers who argued cases in CAAP during the first six months of Phase I. These interviews helped to shape the questions that were asked in later parts of the evaluation. The interviews indicated that a large majority of lawyers viewed the program as helpful. A smaller group had their cases terminated with minimal or no involvement of the arbitrators. A still smaller group was dissatisfied with the program. This pattern of opinions appears consistent with the recent survey of Phase I cases.

I. The Survey of Closed Cases From Phase I

It must be strongly emphasized that this is only a report on the findings of the first surveys of arbitration cases in Phase I of the program (\$50,000 ceiling).¹²¹ Phase II (\$150,000 ceiling) began in May 1987 and too few cases have been terminated and surveyed yet to provide meaningful and accurate data on Phase II. The data on Phase II may be similar to or different from the data reported here.¹²² This report also does not report information from the randomized comparison sample, which has not yet been fully collected.

When cases terminated from CAAP, surveys were sent to the arbitrator and the lawyers of all award cases and one out of four cases reaching settlement. A total of 334 surveys were sent to lawyers and arbitrators involved in 118 cases in Phase I. Of these, 268 surveys were returned, representing 80% of plaintiffs' lawyers surveyed, 74% of defense lawyers and 88% of arbitrators. Occasionally,

¹²¹ Phase I cases are those filed between February 15, 1986, and April 30, 1987.

¹²² Note, however, that because Phase I cases (under \$50,000) are a subset of the Phase II cases (under \$150,000) and because the lawyers who handle Phase I cases are also the same lawyers who handle Phase II cases, it is expected that there will be some correspondence between the Phase I and the Phase II evaluations. When the program was being designed, unofficial Hawaii statistics indicated that 85 percent of all tort cases settled at values of \$150,000 or below and that 60 percent of all tort cases settled at values of \$50,000 or below. The other major difference between Phase I and Phase II is that Phase I was a voluntary program and Phase II is a mandatory program.

however, only one party involved in the arbitration returned the survey. Consequently, plaintiff views are lacking for some cases and defense views for other cases. Initially, data analysis was conducted upon only 49 cases where usable surveys were returned from both plaintiff and defense, and where there was only one plaintiff's and one defense lawyer involved. Interestingly, when data from all the cases were compared to the data from cases where both plaintiff and defense responded, no significant differences were found. Therefore, the data presented in this article comes from the larger set of all 268 responses.

J. Discovery and Cost Reduction

A major goal for the Hawaii arbitration program is to reduce expenses for litigants by reducing discovery. Survey results indicate that discovery was reduced, and it was reduced without affecting the outcome of the case for the most part. (See Table 1.) In cases that settled, 74% of arbitrators, 85% of plaintiffs' lawyers and 76% of defense lawyers thought discovery was reduced. In cases resulting in awards, 95% of arbitrators, 86% of plaintiffs' lawyers and 78% of defense lawyers thought discovery was reduced. It is important to note that 78% of plaintiffs' lawyers and 72% of defense lawyers whose cases went to an award reported that discovery reduction did not affect the outcome of the case, while 22% were sure that it had and 28% were uncertain.

Discovery can be reduced either because lawyers voluntarily agree to limit discovery or because the arbitrator denies requests for discovery. Since arbitrators reported that they denied discovery requests in only 10% of cases reaching settlement and 30% in cases reaching award, the statistics suggest that discovery is being reduced primarily through voluntary discovery reductions by the lawyers. On the issue of discovery denials, defense lawyers perceived more denials of discovery requests than did plaintiffs' lawyers. Nearly 39% of defense lawyers, but only 20% of plaintiffs' lawyers, whose cases went to an award thought discovery requests had been denied. In addition, 28% of defense lawyers, but only 17% of plaintiffs' lawyers, whose cases were settled thought discovery requests had been denied.

Discovery costs also were examined in the evaluation. (See Table 2.) Plaintiffs' lawyers reported lower discovery costs than defense lawyers. Plaintiffs' lawyers reported discovery was less than \$400 in 57% of settlements and 27% of awards. Defense lawyers reported discovery was less than \$400 in 42% of settlements and 34% of awards. Discovery costs were between \$400 and \$1000 for plaintiffs in 34% of settlements and 38% of awards, and above \$1000 in 9% of settlements and 35% of awards. Discovery costs were between \$400 and \$1000 for defense lawyers in 32% of both settlements and awards, and above \$1000 in 26% of settlements and 34% of awards. The average discovery costs for the plaintiffs were \$445 for settlements and \$761 for awards. For defense lawyers,

the discovery costs were \$750 for settlements and \$962 for awards. Until the comparison group data is available, the savings in discovery costs attributable to the program cannot be estimated.

Discovery costs for regular litigation cannot be accurately estimated until the evaluation of comparison cases is completed. In the survey however plaintiffs' lawyers more often saw CAAP as saving cost than did defense lawyers. Plaintiffs' lawyers, 80% who settled and 86% who proceeded to the award stage reported that the case would have cost more if it had not been in CAAP. For defense lawyers, 58% who settled and 52% who went to award reported that the case would have cost more if it had not been in CAAP.

K. Pace of Disposition

The majority of lawyers agreed that if their case had not been in CAAP it would have taken longer to terminate. (See Table 3.) Again, however, the views of the plaintiffs' and defense lawyers differed. Of cases that settled, 87% of plaintiffs' lawyers and 71% of defense attorneys thought the case would have taken longer if it was not in the arbitration program. In award cases, 88% of plaintiffs' lawyers and 63% of defense attorneys thought the case would have taken longer if it was not in the arbitration program.

L. Lawyer Satisfaction

Overall, lawyers were satisfied with the way their cases were handled in the program, but lawyers who reported a voluntary settlement were more often satisfied than were the lawyers whose cases continued to the award stage. (See Table 4.) Furthermore, there was more criticism and dissatisfaction from defense lawyers than from plaintiff lawyers. Satisfaction differed depending on whether the case settled or went to award. The survey revealed that 98% of plaintiffs' lawyers and 86% of defense lawyers whose cases settled were satisfied; 75% of plaintiffs' lawyers and 49% of defense lawyers whose cases went to an award were satisfied.

There is a high correlation between lawyer satisfaction and the lawyer's perception of whether the award was similar to what the lawyer thought the verdict would have been at trial. Remember, however, that the assumption that the case would have gone to trial is quite hypothetical. Trials are infrequent. Less than three percent of tort cases are tried in Hawaii,¹²³ which is even lower than the national average for trials.¹²⁴

¹²³ THE JUDICIARY, STATE OF HAWAII, 1986-1987 ANNUAL REPORT, STATISTICAL SUPPLEMENT (1987). Annual reports for prior years also show a low trial rate.

¹²⁴ See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED

When cases did proceed to the award stage, more plaintiffs' lawyers (64%) than defense lawyers (47%) thought the awards were similar to the expected trial verdict. More defense than plaintiffs' lawyers believed that awards were worse than they would have expected at trial. Seventy-eight percent of plaintiffs' lawyers who saw the awards as similar to verdicts were satisfied with the arbitration program. Sixty-two percent of defense lawyers who saw the awards as similar to verdicts were satisfied with the arbitration program.

Not unexpectedly, lawyers who saw the arbitration award as different from the trial verdict were much less satisfied on both sides of the case. Only 50% of the plaintiffs' lawyers who saw the awards as different from trial were satisfied, and only 13% of the defense lawyers who saw the awards as different from trial were satisfied.

Both plaintiffs' and defense lawyers indicated that they were satisfied with the arbitration program, although they were more satisfied with cases that settled in the program than with cases that went to arbitration awards.¹²⁶ Of cases that settled, 98% of plaintiffs' lawyers and 86% of defense lawyers reported that they were satisfied. In award cases, 74% of plaintiffs' lawyers and 49% of defense lawyers reported that they were satisfied.

M. Terminations and Arbitrator Involvement

In Phase I, 278 cases entered the program between February 15, 1986 and April 31, 1987. As of June 30, 1988, 270 cases had terminated:¹²⁶ 183 were settled, 65 went to awards, 16 were dismissed, 6 were classified as "other," and 8 were pending.¹²⁷ Of the cases that were terminated, settlements accounted for 68% and awards accounted for 24% of the cases.¹²⁸ The ratio of settlements to

STATES COURTS (1987); THE BUSINESS OF STATE TRIAL COURTS 43 (National Center for State Courts 1983).

¹²⁶ Although in this phase of the evaluation clients were not surveyed to determine their satisfaction with the arbitration program, the lawyers were asked to give estimates of their clients' satisfaction. Both plaintiff and defense lawyers thought that their clients were satisfied with the arbitration program. Interestingly, defense lawyers estimated that their clients were more satisfied than they, the lawyers, were, and plaintiffs' lawyers estimated that their clients were equally or less satisfied than they, their lawyers, were. Of cases that settled, both 92% of plaintiffs' lawyers and 92% of defense lawyers estimated that their clients were satisfied. In award cases, 74% of plaintiffs' lawyers and 57% of defense lawyers estimated that their clients were satisfied.

¹²⁶ Termination statistics have been provided by Ed Aoki, Arbitration Administrator.

¹²⁷ Phase II will have a larger number of cases both because of the higher ceiling and largely because the program is mandatory in Phase II. As of June 30, 1988, 974 cases have entered the Phase II program and 447 have terminated. Of the cases that entered Phase II, 211 were settled, 66 went to awards, 96 were dismissed, 53 were exempted, 17 were classified as "other," and 531 are pending in this on-going program.

¹²⁸ In Phase II, settlements have accounted for 55% and awards have accounted for 16% of

awards was approximately three to one (183 to 65).

Some cases settled before the arbitrator was appointed, others settled after the appointment of the arbitrator, but before the arbitrator did any work on the case. Some cases settled with the arbitrator's assistance. Other cases, of course, went to an award. Survey results indicated that arbitrators were actively involved in approximately half the cases. Twenty-eight percent of the cases settled with the arbitrator's assistance.¹²⁹ Twenty-four percent of the cases studied received an arbitrator's award. Of the remaining cases, there was either no arbitrator appointed or very little arbitrator activity. The mean number of hours that arbitrators spent on cases was 5.1 hours on settled cases and 15.4 hours on award cases.¹³⁰

N. Appeals to a Trial De Novo

After an arbitration award, a case can be appealed to a trial de novo. So far, 65 awards have been issued, 26 appeals have been filed, and 16 cases have settled before the trial de novo. All other appeals were still pending. At a later date, the evaluation project will collect data on these appeal cases. In Phase I 40% of the awards have been appealed.¹³¹ Arbitration programs across the country find that a much higher percentage of cases appeal than ultimately go to the trial de novo.¹³² In other arbitration programs, most appeals settle before trial.¹³³

the terminations. As in Phase I, Phase II has experienced a ratio of three settlements (394) to each award (131).

¹²⁹ The arbitrator has the authority "to attempt, with the consent of all parties in writing, to aid in the settlement of the case." HAW. ARB. R. 11(A)(10). However, cases may settle while the arbitrator is working on the case, but without the direct assistance of the arbitrator. In one case reported to the Arbitration Administrator, the lawyers settled the case while waiting in the lobby of the arbitrator just before the first meeting with the arbitrator. This example shows the importance of using court-annexed arbitration to bring the opposing lawyers together to talk about the case earlier than they would normally meet in regular litigation.

¹³⁰ Early returns on Phase II surveys show that mean hours for arbitrators are down slightly in Phase II. The mean number of hours that arbitrators spent on cases was 3.5 hours on settled cases and 13.8 hours on award cases.

¹³¹ In Phase II, 51%, or 38 of the 75 awards have been appealed.

¹³² For example, one study of three federal district courts found that appeals were filed in 60% of cases that went to awards. However, the actual number of trials held was less than the numbers of trials before the arbitration programs began. Lind & Foster, *supra* note 16, at 128.

¹³³ D. HENSLEY, COURT-ANNEXED ARBITRATION IN THE STATE TRIAL COURTS SYSTEM 8 (Rand Institute for Civil Justice 1984).

O. Arbitrator Quality and Supply

The issues of arbitrator quality and supply are very important to the program. The viability of the arbitration program depends upon the ability of volunteer arbitrators, drawn from the ranks of partisan practicing lawyers, to credibly assume the role of high-quality, neutral experts. Two items in the case closing survey are germane to these concerns about perceived arbitrator quality. The vast majority (90%) of both plaintiffs' and defense lawyers agree that arbitrators have the requisite experience to decide the cases before them fairly, and nearly as many, 89% of plaintiffs' and 80% of defense lawyers, believe that the arbitrator was neutral and impartial.

Of course, the arbitration program must have a sufficient supply of qualified arbitrators to meet the case demands. Because the program assigns an arbitrator to a case at a very early stage, each case needs an arbitrator. Initially, 241 arbitrators were in the arbitrator pool for the Phase I program.¹³⁴ The size of the arbitrator pool has been increased to 416 in the Phase II program, but arbitrator supply remains a critical issue for the program. If the Hawaii program was not placing half of the arbitration-eligible cases into a "control group" and re-assigning them back to the regular litigation track, CAAP would not be able to assign arbitrators to every case in the program.

P. Complex Litigation

Although many people have suggested that arbitration may be inappropriate for complex cases,¹³⁵ most lawyers reported that these Phase I cases were not complex. In 1986, the research team conducted a telephone survey of lawyers with cases in or eligible for the \$50,000 Phase I program. One focus of that survey was to determine what types of cases might be inappropriate for CAAP. Several lawyers questioned the appropriateness of arbitration for complex cases. Very few of the lawyers in this recent survey thought that their cases were complex. Only 12% of plaintiff lawyers and 4% of defense lawyers reported that their cases were complex.

¹³⁴ Arbitrators volunteered for the program by agreeing to serve after receiving a letter from the Chief Justice of the Hawaii Supreme Court.

¹³⁵ Results of telephone interviews with lawyers, November-December 1986 (on file in the office of The Study of Arbitration and Litigation, University of Hawaii at Manoa). The arbitrators must have substantial experience in civil litigation and have been licensed to practice in the state for five years. HAW. ARB. R. 10.

Q. Amounts of Settlements and Awards

The 24 surveyed cases that settled averaged \$20,803.63. Arbitration awards were somewhat higher. If the zero awards are excluded from the survey results, the mean value of awards was \$28,662.92. If the 3 zero awards are included, the average was \$25,223.37.

Plaintiffs' lawyers reported that settlements averaged \$21,899 and that awards averaged \$27,875. Defense lawyers reported slightly lower averages, \$20,060 for settlements and \$25,105 for awards (excluding zero awards).

The survey also asked lawyers to report what they initially thought their case was worth. Defense lawyers, on the average, valued the amount at issue lower than the plaintiffs' lawyers did. Plaintiffs' lawyers' estimates of the worth for cases that went to settlement averaged \$29,407 and for awards \$30,488. For defense, estimates of the worth for cases that settled averaged \$19,408 and awards averaged \$12,795.

R. Insurance Companies

Because insurance companies initially provided part of \$200,000 in private funding to begin Phase I of CAAP, it can be assumed that these companies thought the program would save defense costs. So far, however, there has been no direct critique from insurance companies concerning the arbitration program. If the program does in fact save defense costs, an interesting economic factor may arise on the defense side. Reduced discovery should be viewed as a positive factor by the insurance companies because their costs will decrease. Reduced discovery, however, will mean that the defense lawyers will then find that their incomes have decreased. The ramifications of this clash of interests on the defense side are open to speculation.

IV. CONCLUSIONS

The initial findings of the evaluation of Hawaii's Court-Annexed Arbitration Program indicate that the program is meeting its goals. Costs to litigants have decreased, the pace of disposition has increased, and the satisfaction of the lawyers has been maintained. Most importantly from a national perspective is the indication that in a carefully controlled arbitration program, discovery (and correspondingly costs to litigants) can be reduced without impairing the fairness of the dispute resolution process. Court-Annexed Arbitration, particularly in the Hawaii form, appears to offer great promise in reducing the long standing problems of delay and costs in the United States' legal system.

Participating lawyers differ somewhat in their view of CAAP. Lawyers were

satisfied with the program, although more plaintiffs' lawyers were satisfied than were defense lawyers. As might be expected, more lawyers were satisfied with their voluntary settlements than with the awards rendered by the arbitrators.

Most plaintiffs' lawyers, defense lawyers and arbitrators reported that the program reduced discovery and that discovery reduction did not affect case outcome. Most plaintiffs' lawyers believed that if their case had not been in CAAP it would have cost more to terminate the case. Only about half of the defense lawyers believed that the arbitration program was less costly than ordinary litigation. Similarly, most plaintiffs' lawyers believed that if their case had not been in the arbitration program it would have taken longer to terminate the case. Only about half of the defense lawyers believed that the arbitration program was faster than ordinary litigation. Later evaluation efforts will explore the reasons for the consistent differences in views of plaintiffs' and defense lawyers. It is possible, however, that CAAP has in some way changed the practice of law, especially for defense lawyers, and this change, rather than economic factors, accounts for the less favorable opinion about CAAP by defense lawyers.

TABLE 1
DISCOVERY REDUCTION
(SHOWN IN PERCENTAGES)

	PLAINTIFF		DEFENSE	
	SETTLEMENT	AWARD	SETTLEMENT	AWARD
DISCOVERY REDUCED	85	86	76	78
NOT REDUCED	15	14	24	22
	n=40	n=43	n=37	n=51
DISCOVERY REDUCTION AFFECTED OUTCOME				
NO	86	78	71	72
YES OR MAYBE	14	22	29	28
	n=36	n=41	n=32	n=49
ARBITRATOR DENIED DISCOVERY REQUEST				
NO	83	80	72	61
YES	17	20	28	39
	n=35	n=41	n=29	n=46

TABLE 2
COSTS

COSTS IF NOT IN ARBITRATION				
LESS	-	2	5	11
SAME	20	12	37	37
GREATER	80	86	58	52
	n=40	n=42	n=38	n=46
DISCOVERY COST				
≤\$400	57	27	42	34
401-999	34	38	32	32
1000 and over	9	35	26	34
Average Cost	\$445	\$761	\$750	\$962
	n=35	n=37	n=31	n=35

TABLE 3
PACE: ARBITRATION COMPARED TO LITIGATION

IF CASE WAS NOT IN CAAP, IT WOULD HAVE CLOSED				
SOONER	-	5	-	13
IN SAME TIME	13	7	29	24
LATER	87	88	71	61
	n=39	n=42	n=38	n=46

TABLE 4
LAWYER SATISFACTION

<u>SATISFACTION</u>				
LAWYER				
SATISFIED	98	75	86	49
DISSATISFIED OR AMBIVALENT	2	25	14	51
	n=39	n=43	n=36	n=49
AWARD COMPARED WITH ESTIMATED TRIAL VERDICT				
SIMILAR	64		47	
DIFFERENT	36		53	
	n=42		n=45	
AWARD COMPARED WITH EXPECTATION FOR AWARD				
BETTER	14		-	
SAME	43		43	
WORSE	43		57	

TABLE 5
RATINGS OF ARBITRATORS

	PLAINTIFF		DEFENSE	
	SETTLE	AWARD	SETTLE	AWARD
ARBITRATOR EXPERIENCE				
NOT ENOUGH		19	3	15
YES, ENOUGH	100	81	97	85
	n=32	n=36	n=33	n=46
ARBITRATOR FAIRNESS				
IMPARTIAL	91	88	82	79
PARTIAL BUT NO EFFECT	9	2	12	6
PARTIAL AND EFFECT	-	10	6	15
	n=32	n=40	n=33	n=48

TABLE 6
AVERAGE SETTLEMENT AND AWARD AMOUNTS

	PLAINTIFF		DEFENSE	
	SETTLE	AWARD	SETTLE	AWARD
MEAN AMOUNTS, EXCLUDING ZERO AMOUNTS	\$21,899	\$27,875	\$20,060	\$25,105
	n=41	n=37	n=38	n=40
MEAN AMOUNTS, INCLUDING ZERO AWARDS		\$23,985		\$19,690
		n=43		n=51
ESTIMATES OF WORTH	\$29,407	\$30,488	\$19,408	\$12,795
	n=38	n=43	n=30	n=44

